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OFFICE OF PETITIONS

In re Application of :
Lawrence R. McGee, et al. :
Application No. 10/810,325 : **ON PETITION**
Filed: March 25, 2004 :
Attorney Docket No. 11134-123-999 :

This is a decision in response to the petition, filed October 16, 2007, which is being treated as a petition under 37 CFR 1.137(b) to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is **not** a final agency action within the meaning of 5 U.S.C. ' 704.

The application was held abandoned for failure to timely respond to the final Office action mailed December 18, 2006. A Notice of Abandonment was mailed on June 25, 2007. On October 16, 2007, the present petition was filed.

Petitioner asserts that the abandonment resulted from an error on the part of the U.S. Patent and Trademark Office. Petitioner explains that a timely response to the Office action of December 18, 2006 was submitted in the form of a Notice of Appeal, with an appropriate 3-month petition for extension of time, on June 15, 2007. However, petitioner notes that the papers filed on June 15, 2007 were directed to an incorrect application number. It is also noted that the post card receipt includes a different incorrect application number. A response that has an incorrect application number is handled in accordance with MPEP 508.03. If a paper having an incorrect application number contains sufficient information to identify the correct application and it was timely filed, the holding of abandonment will be withdrawn.

In reviewing the papers submitted, it is concluded that the information contained thereon was sufficient to associate the papers with the correct application. The Notice of Appeal, Petition for Extension of Time and fees filed on June 15, 2007 have been located in the incorrect application. The papers filed June 15, 2007 will be moved from the incorrect application to the present application where they were intended. However, it is now clear that this application became abandoned as a result of petitioner's failure to prosecute this application by filing an appeal brief (and fee required by 37 CFR 41.20(b)(2)) within the time period provided in 37 CFR 41.37(a)(1).

As an appeal brief (and appeal brief fee) was not filed within two (2) months of the Notice of Appeal filed June 15, 2007, and no extensions of time under the provisions of 37 CFR 1.136(a) were

obtained, the appeal is considered dismissed and the proceedings as to the rejected claims are terminated. See 37 CFR 1.197(b). As no claim was allowed, the application became abandoned on August 16, 2007. See MPEP 1215.04.

A grantable petition under 37 CFR 1.137(b)¹ must be accompanied by: (1) the required reply,² unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Director may require additional information. See MPEP 711.03(c)(II)(C) and (D). The petition lacks item 1.

It is noted that petitioner included a Notice of Appeal and fee, as well as a 3-month extension of time and with the present petition. Since the application became abandoned for a failure to timely file **the Appeal Brief under 37 CFR 41.37(a)(1) and fee set forth in 37 CFR 41.20(b)(2)**, not as a result of a failure to respond to the final Office action noted in the Notice of Abandonment mailed June 25, 2007, the Notice of Appeal filed October 16, 2007 will not be processed. Further, the present petition for extension of time is unnecessary since any extension of time under 37 CFR 1.136 must be filed prior to the expiration of the maximum extendable period for reply. See In re Application of S., 8 USPQ2d 1630, 1631 (Comm'r Pats. 1988). Petitioner should note that the proposed reply required for consideration of a petition to revive must be an Appeal Brief (and fee required by 37 CFR 41.20(b)(2)), an amendment that *prima facie* places the application in condition for allowance, a Request for Continued Examination (RCE) and submission (37 CFR 1.114), or the filing of a continuing application under 37 CFR 1.53(b). See MPEP 711.03(c)(II)(A)(2).

Under the circumstances, the \$510 appeal fee and the \$1,050 extension fee will be applied toward the \$1,540 petition fee for the present petition, resulting in an overpayment of \$20. The \$20 overpaid is subject to refund, upon the filing of a request therefor, or may be applied towards the fee required for an Appeal Brief, if one is being filed in response to this decision.

Any request for refund of the \$20 overpaid must include a copy of this decision and be mailed to Mail Stop 16, Director of the U.S. Patent and Trademark Office, P. O. Box 1450, Alexandria, VA 22313-1450 or faxed to the Customer Service Help Desk at (571) 273-6500.

Further correspondence with respect to this matter should be addressed as follows:

By Mail: Mail Stop PETITION
 Commissioner for Patents
 P. O. Box 1450
 Alexandria, VA 22313-1450

By hand: U. S. Patent and Trademark Office
 Customer Service Window, Mail Stop Petitions

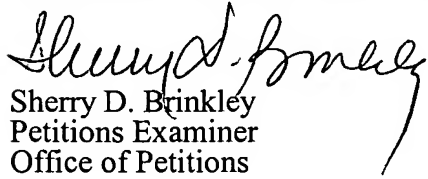
¹ As amended effective December 1, 1997. See Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131, 53194-95 (October 10, 1997), 1203 Off. Gaz. Pat. Office 63, 119-20 (October 21, 1997).

² In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

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401 Dulany Street
Alexandria, VA 22314

The centralized facsimile number is **(571) 273-8300**.

Any questions concerning this matter may be directed to the undersigned at (571) 272-3204.



Sherry D. Brinkley
Petitions Examiner
Office of Petitions